

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
WINSTAR BROADCASTING CORP.)	File No. BPCT-19960723KW
)	Facility ID No. 83248
For a Construction Permit for a New)	
Television Station on Channel 21,)	
Virginia Beach, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 2002**Released: March 25, 2002**

By the Commission:

1. The Commission has before it for consideration: (1) an Application for Review filed on July 2, 2001, by Robert O. Copeland ("Copeland"), requesting review of a June 18, 2001 Letter Ruling of the Chief, Video Services Division, Mass Media Bureau, which denied his Petition to Deny the above-captioned application;¹ and (2) a Request for Stay, filed on August 1, 2001, by Winstar Broadcasting Corp. ("Winstar"), seeking relief from the Commission's requirement that it make its final payment pursuant to its winning bid in Closed Broadcast Auction No. 25 ("Auction") for the above-captioned broadcast television station.²

Copeland's Application for Review

2. Winstar was the high bidder for Channel 21 in the auction, held September 28, 1999, and Copeland was the runner-up bidder. Copeland timely filed a Petition to Deny Winstar's application, alleging that prior to the auction Winstar engaged in a transfer of control, thereby rendering it ineligible to bid in the auction. Copeland also argued that Winstar engaged in misrepresentation by falsifying its ownership structure in order to manipulate the auction and

¹ The following additional pleadings were received with respect to Copeland's Application for Review: (1) an Opposition to Application for Review filed by Winstar on July 17, 2001; (2) an Erratum to Winstar's Opposition to Application for Review filed on July 18, 2001; (3) a Reply to Opposition to Application for Review filed by Copeland on July 23, 2001; (4) a Motion for Leave to Supplement Application for Review filed by Copeland on September 14, 2001; (5) an Opposition to Motion for Leave to Supplement Application for Review filed by Winstar on September 24, 2001; (6) a Reply to Opposition to Motion for Leave to Supplement Application for Review filed by Copeland on October 4, 2001; (7) a Motion for Leave to File Additional Supplement to Application for Review filed by Copeland on January 8, 2002; and (8) an Opposition to Motion for Leave to File Additional Supplement to Application for Review filed by Winstar on January 18, 2002.

² The following additional pleadings were received with respect to Winstar's Request for Stay: (1) a Motion for Extension of Time to Respond to Request for Stay filed by Copeland on August 7, 2001; and (2) an Opposition to Request for Stay filed by Copeland on August 17, 2001.

gain a competitive advantage. Furthermore, Copeland claimed that Winstar is financially unqualified to acquire the Virginia Beach construction permit because its parent companies, WCI and Winstar New Media Company, Inc.,³ both filed for Chapter 11 bankruptcy.

3. On June 18, 2001, the Chief, Video Services Division (“Division”) issued a Letter Ruling, finding that Copeland’s petition failed to make specific allegations of fact sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest. The Division further concluded that no substantial and material question of fact had been raised concerning the application. Copeland timely filed an application for review of the Letter Ruling.

4. Copeland claims as grounds for review that the staff erred when it failed to conclude that substantial and material questions of fact were raised as to: (1) whether Winstar engaged in a transfer of control, thereby rendering its application ineligible to participate in the auction; and (2) whether Winstar is financially qualified to acquire the construction permit. We find that these arguments, raised by Copeland in prior pleadings, were thoroughly considered and properly resolved by the staff, and we uphold the staff decision for the reasons stated therein. There is no reason to disturb it. *See WAMC, Inc.*, 10 FCC Rcd 12219 (1995).⁴

Winstar’s Request for Stay

5. Winstar has filed a Request for Stay, seeking temporary relief from the Commission’s requirement that it make its final payment pursuant to its winning bid for Channel 21, Virginia Beach, Virginia. Specifically, Winstar requests a stay of its obligation to submit the remaining balance of its winning bid for the Virginia Beach construction permit until such time as its application is no longer subject to administrative or judicial review. For the reasons set forth below, we deny Winstar’s Stay Request and find that Winstar is in default on its full payment obligation with respect to the construction permit for Channel 21, Virginia Beach, Virginia.

6. **Background.** On July 3, 2001, the Mass Media Bureau (“Bureau”) issued a Public Notice, announcing that it was prepared to grant the Virginia Beach construction permit to Winstar upon Winstar’s timely payment of the balance of its winning bid (“*Payment Public Notice*”).⁵ In the *Payment Public Notice*, the Bureau set July 18, 2001 as the date on which final payment was due, and set August 1, 2001 as the deadline on which final payment could be made with a 5% late penalty, as expressly provided in Section 1.2109(a) of the Commission’s rules.

³ Winstar is a wholly owned subsidiary of Winstar New Media Company which, in turn, is wholly owned by Winstar Communications, Inc.

⁴ On January 8, 2002, Copeland filed a “Motion for Leave to file Additional Supplement to Application for Review”, alleging that ownership and control of Winstar had been transferred from Winstar Communications, Inc. to IDT Corp. without the Commission’s consent. However, Winstar filed a response on January 18, 2002, stating that while IDT Corp. did acquire certain assets of Winstar’s parent companies, it did not acquire the capital stock of Winstar. Winstar further states that it is listed as an excluded subsidiary in Schedule 1.1(a)(iii) of Winstar Communications, Inc.’s bankruptcy petition. Thus, Winstar maintains that its ownership is unaffected by IDT Corp.’s acquisition of assets in the bankruptcy proceeding. Based upon the materials submitted up to this point, we do not believe that Copeland’s latest allegations warrant further Commission consideration.

⁵ *Public Notice: “FCC Announces It Is Prepared to Grant Broadcast Construction Permit After Final Payment Is Made,”* 16 FCC Rcd 13134 (2001).

7. The *Payment Public Notice* indicated that, pursuant to Section 1.2109(a), if a winning bidder failed to pay the balance of its winning bid by the late payment deadline of August 1, 2001, it would be considered in default of its license and subject to the applicable default payment. Winstar's winning bid for the Virginia Beach construction permit was \$8,752,000.00. Pursuant to Commission rules, Winstar submitted to the Commission an upfront payment in the amount of \$1,750,400.00 prior to the auction. On August 1, 2001, the date of the late payment deadline, Winstar filed its Stay Request. However, Winstar did not submit full payment of the remaining balance of its winning bid plus the applicable late payment penalty by the late payment deadline, and has not tendered payment since that time.

8. **Discussion.** Section 1.44 of the Commission's Rules gives the Commission discretion to stay an action. Specifically, the provision states that, "Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading." Although Winstar has styled its pleading as a request for a stay, we believe that the relief it has requested is analogous to a request for waiver of Section 1.2109(a). Winstar is not seeking a stay of a Commission "decision" or "order" as required by Section 1.44. Consequently, Winstar's request should not be considered under the four-part test for a stay.

9. While an applicant for a waiver faces a heavy burden of persuasion, the Commission must give a "hard look" to meritorious waiver requests and may grant such requests where the waiver will not undermine the policy of the general rule and where public interest considerations require the waiver. *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656 (D.C. Cir. 1984); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. (1972)). Although the subject construction permit was won in the first auction of broadcast licenses, there is a significant body of precedent addressing the payment deadlines in the Commission's Part 1 competitive bidding rules. In particular, the Commission has considered waiver requests for second down payments and final payments in other auctioned services, primarily for authorizations issued by the Wireless Telecommunications Bureau ("WTB"). We note that Section 1.2109 applies to winning bidders of licenses and permits in all auctionable services.⁶ Furthermore, there is no rule or case holding that a winning bidder may delay a final payment because a challenge to the winning bidder's application is still pending. See 47 C.F.R. § 73.5006(d).⁷

10. Waivers of second down payments or final payments in other auctions have not involved requests, such as Winstar's, to defer a payment obligation until grant of the application is no longer subject to administrative or judicial review. Rather, the vast majority of payment deadline waiver cases involve retroactive requests occasioned by the winning bidder's having missed a payment deadline due to inadvertence or administrative error. In these waiver request cases, a waiver was granted where the winning bidder demonstrated prior compliance with

⁶ Section 73.5000 of the Commission's rules indicates that Part 1 rules apply unless otherwise indicated in the service specific rule. 47 C.F.R. § 73.5000. Section 73.5003(c) additionally provides a cross-reference to Section 1.2109. 47 C.F.R. § 73.5003(c).

⁷Section 73.5006(d) of our rules (47 C.F.R. § 73.5006(d)) provides that "[i]f the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) ... is ready to be granted, upon full payment of the balance of the winning bid(s)." Section 73.5003(c) sets forth the time period within which the balance of the winning bid must be paid.

Commission rules, good faith, or prompt action to rectify the delinquency; there was no record that the payment shortfall was part of a deliberate effort to delay payment; the public interest would not be served by rigid enforcement of the payment deadline; and some flexibility was appropriate in addressing a minor delinquency with respect to the payment.⁸ Typically in such cases, the waiver was conditioned upon payment of an additional 5% of the final or second down payment as a penalty. In 1998, Section 1.2109(a) of our rules was amended to impose a 5% late penalty for final payments submitted within ten days of the payment deadline,⁹ essentially codifying the prior practice. Since amending that rule, we have not waived a final payment deadline in any auction context.

11. Additionally, it has consistently been held that, barring any unique or unusual circumstances, a winning bidder that fails to pay the balance of its bid by the late payment deadline will be in default on its license and subject to applicable default payments. *See Metro-Trak, LLC*, 15 FCC Rcd 13370 (WTB 2000); *Citifone PCS*, 16 FCC Rcd 13970 (WTB 2001). In this case, Winstar has not shown that the underlying purpose of Section 1.2109(a), the late payment rule, would be frustrated by enforcing the late payment deadline or that unique or unusual circumstances exist that would justify granting a waiver. We note that the existence of pending administrative and judicial appeals after an auction is not an unusual or unique circumstance. *See Black Crow Wireless, L.P.*, 16 FCC Rcd 15643 (WTB 2001).¹⁰ Winstar argues that its “investment in acquisition and construction of the new station may not be recognized as an asset of the corporation” due to the ongoing threat of reversal. At the same time, Winstar maintains that its ability to recoup its investment through an assignment of the authorization to a third party is materially impaired by the same threat of revocation. These bare allegations, unsupported by evidence, do not justify a waiver. Moreover, even if these allegations were substantiated, rather than unsupported, they would still not warrant a waiver.

12. Furthermore, the Commission has specifically stated that if the winning bidder in a closed broadcast auction defaults, the construction permit must be offered to the next highest bidder, rather than reauctioning it to new applicants.¹¹ Thus, a waiver of our payment deadline would prevent Copeland, the next highest bidder in the auction, from exercising his right under our auction rules to timely receive the construction permit due to Winstar’s default. Moreover, we previously rejected Copeland’s argument that Winstar was not financially qualified to obtain the construction permit based on our view that our auction payment procedures would

⁸ *See, e.g., Electronic SMR Communication Services*, 12 FCC Rcd 1520 (WTB 1997) (bidder submitted amount due upon notification of delinquency and subsequently sought waiver); *Phillip C. Merrill*, 13 FCC Rcd 7408 (MMB, VSD 1998) (MDS bidder missed second down payment deadline, but wired payment plus 5% late fee to Commission three business days after deadline and filed waiver request immediately thereafter); *Metricom, Inc.*, 13 FCC Rcd 890 (WTB 1998) (winning bidder’s final payment returned by Mellon Bank, causing it to be late on re-submission; partial waiver granted because Metricom did not deliberately delay payment).

⁹ *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Rulemaking*, 13 FCC Rcd 374, 515-16 (1997).

¹⁰ Additionally, Winstar’s assertion that the 36-month construction period will run against it pending administrative or judicial review is incorrect. While we would issue a construction permit upon final payment, the period in which Winstar would be required to build its station would be tolled pending administrative or judicial review. *See* 47 C.F.R. § 73.3598(b)(ii).

¹¹ *See Implementation of Section 309(j) of the Communications Act First Report and Order*, 13 FCC Rcd 15920, 15952 (1998), *on recon.*, 14 FCC Rcd 8724 (1999).

demonstrate Winstar's financial qualifications. In the Letter Ruling the Division stated that, "Winstar has already submitted its substantial upfront payment . . . for the construction permit. Additionally, Winstar asserts that it is committed to paying the auction price of \$8,752,000.00 upon notification and direction of the Commission." The Commission has provided such notification through the issuance of the *Payment Public Notice*. To reject Copeland's financial arguments based on our payment procedures and then indefinitely suspend Winstar's obligation to make its final payment would also be inconsistent and unfair to Copeland.

13. Finally, we find that the public interest would not be served by grant of a waiver of Winstar's final payment obligation, because this would defeat the clear policy objective of Section 309(j) of the Communications Act, which requires the Commission to promote the "rapid deployment of new technologies, products and services for the benefit of the public...." Expeditious provision of service to the public is one of the primary objectives of our auction rules. Congress mandated that we design competitive bidding systems for the award of construction permits in order to promote "the development and rapid deployment of new technologies, products or services for the benefit of the public, including those residing in rural areas, *without administrative or judicial delays*." (emphasis added) 47 U.S.C. § 309(j)(3)(A). Our auction rules have been designed to carry out this mandate, as well as to guarantee that only serious, financially qualified applicants receive broadcast construction permits.¹² Therefore, we require an upfront payment before auction, an initial down payment following the close of the auction, and a timely final payment within ten business days of a public notice announcing that the construction permit is ready for grant.¹³ A winning bidder that fails to make its final payment within ten business days of the final payment public notice has an additional ten business days in which to pay its balance, along with a 5% late penalty.¹⁴ The Commission declined to provide for a lengthier late payment period because it believed that "extensive relief from initial payment obligations could threaten the integrity, fairness and efficiency of the auction process."¹⁵

14. Under the Commission's rules, a winning bidder that fails to timely remit a required payment is deemed to have defaulted on its auction payment obligation.¹⁶ The Commission's rules also provide that under such circumstances, the Commission will dismiss the bidder's application.¹⁷ The announcement of the winning bidder in an auction terminates the bidding and establishes, as of the moment of acceptance of the high bid, a binding obligation to pay the winning bid price for the licenses.¹⁸ When a winning bidder defaults, thereby breaching the payment obligation, the winning bidder's liability remains a function of the high bid and is

¹² 47 U.S.C. § 309(j) (3)(A); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2375 (1994); *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904, 5907-08 (WTB 1997), *aff'd*, 13 FCC Rcd 21983 (1997), *review denied in part and dismissed in part, Mountain Solutions LTD, Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999).

¹³ 47 C.F.R. §§ 73.5003(c), 1.2109(a).

¹⁴ *Id.*

¹⁵ *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 429 (1997).

¹⁶ 47 C.F.R. § 1.2109(c), 73.5004(a).

¹⁷ 47 C.F.R. § 1.2109(b)-(c), 73.5004(b).

¹⁸ *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15328, ¶ 69 (2000).

based on the obligation that was incurred at auction.¹⁹ Thus, the defaulting high bidder becomes subject to the default payment provision of 47 C.F.R. § 1.2104(g). These provisions were part of our rules before Auction No. 25 commenced. Furthermore, the consequences of default were spelled out in several public notices, including the *Payment Public Notice*.²⁰ Clearly, Winstar had notice of those consequences when it chose to participate in the auction.

15. Without the default payment rules, a winning bidder might consider adopting a strategy of waiting until the actual license grant before deciding whether or not to accept the license, to the detriment of other bidders and the efficient and fair functioning of the auction process.²¹ Thus, the default provisions are critical for maintaining the integrity of the auction process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.²²

16. Winstar's application will be dismissed, and the Virginia Beach construction permit will be offered to Copeland, the next highest bidder, at his last bid amount. Furthermore, Winstar is subject to the default payment provisions specified in 47 C.F.R. § 1.2104(g). Specifically, Winstar is liable for a default payment equal to the difference between the amount that it bid and the amount of Copeland's final bid. In addition, Winstar is liable for an additional payment equal to three percent of Copeland's bid. Winstar's upfront payment will be applied to this default payment, and we will refund to Winstar the remainder of its funds on deposit with the Commission.

17. ACCORDINGLY, IT IS ORDERED That, the Application for Review filed by Robert O. Copeland IS HEREBY DENIED.

18. IT IS FURTHER ORDERED That, the Request for Stay filed by Winstar Broadcasting Corp. IS DISMISSED, and when considered as a Request for Waiver IS HEREBY DENIED.

19. IT IS FURTHER ORDERED That, the above-captioned application of Winstar Broadcasting Corp. (File No. BPCT-19960723KW) IS DISMISSED.

20. IT IS FURTHER ORDERED That, pursuant to 47 C.F.R. § 1.2104(g)(2), Winstar is assessed a bid deficiency payment of \$796,000, representing the difference between its gross winning bid and Copeland's high bid, plus a penalty under 47 C.F.R. § 1.2104(g)(2) in the amount of \$238,600, representing 3% of Copeland's high gross bid, for a total default

¹⁹ *Id.*

²⁰ See, e.g., *Pubic Notice: "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV and FM and TV Translator Construction Permits Scheduled for September 28, 1999 – Minimum Opening Bids and Other Procedural Issues,"* 14 FCC Rcd 10632, 10677 (1999) ("Pre-Auction Public Notice"); *Public Notice: "Closed Broadcast Auction No. 25 Closes- 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits,"* 14 FCC Rcd 17186, 17189-90(1999); *Public Notice: FCC Announces It Is Prepared to Grant Broadcast Construction Permit After Final Payment Is Made,* 16 FCC Rcd 13134 (2001).

²¹ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order,* 9 FCC Rcd 2348, 2375 (1994); *BDPCS, Inc.,* 15 FCC Rcd 17590 (2000).

²² *Id.*

assessment of \$1,034,680, to be deducted from Winstar's upfront payment totaling \$1,750,400 already tendered. Therefore, in accordance with Section 1.2104 of the Commission's rules, the Commission is prepared to refund to the payor(s)²³ of record the balance of \$715,720.00. To obtain a refund, the payor(s) of record must submit a request in accordance with the instructions set forth in Attachment A.

21. The Chief, Video Services Division, Mass Media Bureau, IS HEREBY DIRECTED to proceed in accordance with 47 C.F.R. §§ 1.2104, 1.2109, and 73.5004, and paragraph 86 of the *Broadcast First Report and Order*.²⁴ If Copeland needs to submit an amendment to its previously filed long-form application, it must do so within 30 days of the date of release of this *Memorandum Opinion and Order*, in accordance with 47 C.F.R. § 73.3513 and with the same number of copies as the originally filed long-form application. The amendment may not constitute a major change from either the technical or legal proposal specified in the previously filed long-form application. Any amendment shall include, to the extent not already provided by Copeland, the exhibits mandated by 47 C.F.R. §§ 73.5005(a), 1.2107(d), 1.2110(j), and 1.2112(a) and (b). After the 30-day amendment period, Copeland's application will be placed on public notice, starting the period for filing any petitions to deny.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²³ See *Entertainment Unlimited, Inc., Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, Memorandum Opinion and Order*, 16 FCC Rcd. 10030 (2001) (noting that the Commission does not accept instructions regarding the refund of excess upfront payments from entities or individuals other than the payor of record).

²⁴ 47 C.F.R. §1.2104(g)(2).

Attachment A**Requesting Refund Instructions**

In order to process refund requests, the FCC must receive wire transfer instructions that include the following information:

Name and Address of Bank
ABA Number
Contact and Phone Number
Account Number to Credit
Name of Account Holder
Correspondent Bank (if applicable)
ABA Number
Account Number

Please include your Taxpayer Identification Number (TIN) and a copy of this letter. This information should be sent to the Auctions Accounting Group:

Federal Communications Commission
Auctions Accounting Group
Attention: Michelle Bennett or Gail Glasser
445 12th Street, SW, Room 1-A843
Washington, DC 20554

Requests can also be faxed to the Auctions Accounting Group at (202) 418-2843.